Supreme Court of the United States

OCTOBER TERM, 1926

No. 311

GEORGE W. CROSSMAN AND ANOTHER,
Appellants,

against

THEODOR C. LURMAN AND ANOTHER,
Defendants-in-Error.

BRIEF FOR DEFENDANTS-IN-ERROR

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No. 12,345.

ARTHUR PRINTING CO., 13 Vesey St. TEL. 1900 CORTLANDT.

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Supreme Court of the United States,

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No. 117.

GEORGE W. CROSSMAN and another,
Plaintiffs-in-Error,

against

THEODOR G. LURMAN and another,
Defendants-in-Error.

Brief for Defendants-in-Error.

On May 9th, 1903, the Governor of the State of New York approved an act (Chapter 661, Laws of 1893) passed by the Legislature of the State of New York and which thereupon took immediate effect, being Chapter 25 of the General Laws of the State of New York and known as "The Public Health Law."

Article III, Section 40 thereof provides that the term food when used in that act

"shall include every article of food and every beverage used by man and all confectionery;"

And Section 41 provides that:

"No person shall within the State * * * * * * have, sell, or offer for sale any adulter-

ated food or drug. An article shall be deemed to be adulterated within the meaning of this act * * * B. In the case of food * * * 6. If it be colored or coated * * or powdered whereby damage is concealed * * * ,,

In this suit, the plaintiffs-in-error, who were the plaintiffs below, seek to reverse a judgment; entered in the Supreme Court of the State of New York on a remittitur from the Court of Appeals of that State affirming a judgment of the Appellate Division of the Supreme Court (First Department) of the State of New York which affirmed a judgment entered on a verdict in favor of the defendants rendered at a Trial Term of the Supreme Court; on the sole ground that the statute quoted is unconstitutional as being in conflict with or repugnant to Article I, Section 8, Clause 3 of the Constitution of the United States, and to the Act of Congress, Laws of 1890, Chapter 839.

The Facts.

The action was brought by the plaintiffs-in-error in the Supreme Court of the State of New York to recover damages alleged to have been sustained by the defendant's refusal to accept certain coffees tendered to them by the plaintiffs-in-error on or about August 14, 1894, under an executory contract made July 17, 1894.

The plaintiffs-in-error conceded from the outset that a large portion of the coffee was in fact colored, coated and powdered with a yellow substance which the testimony shows to have been some form of and in the general nature of that chemical known as "oxide of iron" (foot of page 23 and pages 42 and 43).

It was not claimed that this improved the taste or added to the value of the coffee.

The jury found that this coloring, coating and

powdering did in fact conceal damage present in the coffee.

It is submitted that:

I.

Chapter 661, of the Laws of 1893, of the State of New York, is not repugnant to Article 1, Section 8, Clause 3, of the Constitution of the United States, nor to the Act of Congress, Laws of 1890, Chapter 839.

(*a*) It certainly is not repugnant to either the constitutional provision or the Act of Congress in the aspect of its application to an article of food produced, intended for sale and intended for consumption within the State of New York.

(*b*) Equally is it not repugnant to either the constitutional provision or the Act of Congress in the aspect of its application to an article of food brought from a foreign country or other State into the State of New York and intended for sale and consumption therein.

(*c*) It is in any aspect of its possible application a valid exercise of the police power of the State of New York.

(*d*) The defendants in error were properly allowed to rely upon it for their defence to this action.

(*e*) It was not error to apply it so as to prohibit the sale within the State of New York of an article of food which is an article of interstate and foreign commerce, and which was in this instance imported from a foreign country.

(*f*) It was not error to exclude evidence offered for the purpose of showing an established interstate and foreign trade or commerce to exist in an article of food adulterated within the meaning of its provisions.

II.

The line of demarcation between the reserved police powers of the State in relation to inspecting and prohibiting dealings in that which would be injurious to the public health or morals, or was designed to cheat or defraud, and those matters which fall within the regulation of commerce with foreign countries and between the States is clear and has been defined by this Court on several occasions.

In Bowman vs. Chicago & Northwestern Railway Co., 125 U. S., 465, the Court held the Iowa law forbidding the bringing into that State of intoxicating liquors without having first obtained a certificate that the consignee was authorized to sell such intoxicating liquors within the particular county repugnant to the constitution of the United States on the ground that it was not an inspection law or a sanitary or quarantine regulation, nor a legitimate exercise of police power by the State, and in its opinion pointed out clearly the distinction which applies here.

For it is to be noted that these coffees were, in the condition in which they were tendered to the defendants in error, clearly within the phrase used in the Court's opinion where it speaks of

> "provisions that are ***decayed or otherwise from their condition and quality unfit for human use or consumption."

The distinction is by no means a narrow one, but is broad and comprehensive. A State can under its reserved police powers pass an inspection law —and a public health law is clearly within the definition of an inspection law—which shall prevent dealings within that State in articles which are (to quote again from the same opinion)

> "not merchantable,"

and which

> "are not legitimate subjects of trade and commerce".

As the Court says:

> "They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self protecting power of each state, therefore, may be rightfully exerted against their introduction and such exercise of power cannot be considered regulations of commerce prohibited by the Constitution."

Or as the Court, quoting the language of Mr. Justice CATRON in the License Cases, continuing, says:

> "The assumption is that the police power was not touched by the Constitution, but left to the States as the Constitution found it. This is admitted and whenever a thing from character or condition is of a description to be regulated by that power in a State, then the regulation may be made by the State and Congress cannot interfere. But this must always depend upon facts subject to legal ascertainment, so that the injured may have redress, and the fact must find its support in this; whether the prohibited article belongs to and is subject to be regulated as a part of foreign commerce or of commerce among the States. If from its nature it does not belong to commerce, or if its condition from putrescence or

other cause is such when it is about to enter the State that it no longer belongs to commerce, or in other words is not a commercial article, then the State power may exclude its introduction. And as an incident to this power a State may use means *to ascertain the fact.* And here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this Court in the cases of Gibbons vs. Ogden, Brown vs. Maryland and New York vs. Miln."

So also in Schollenberger vs. Pennsylvania, 171 U. S., 1, where the distinction sharply arose in relation to oleomargerine. In that instance the state statute was held invalid in so far as it wholly prohibited the introduction of oleomargerine from another State and its sale in the original package, leaving, however, untouched those aspects of such a statute which may be said to correspond with the scope of the statute under consideration in this case.

The substance of the opinion in that case is that a State cannot refuse to permit the introduction of the pure and unadulterated article within its borders merely because it chooses to decide or assume that that is the only method of preventing the importation of the article in an impure or adulterated condition.

The cases showing the distinction which is contended for by the defendants-in-error are so fully abstracted in the opinions in Bowman v. Chicago & Northwestern Railway Co. and Schollenberger vs. Pennsylvania, and also, the distinction and its application to the present case is so well

covered in the opinion of Mr. Justice Haight in the Court of Appeals of the State of New York in this case (Printed Record, pages 163–167) that little more need be said on this point. Though it may be added that the expressions of Mr. Justice Harlan in delivering the opinion of this Court in Plumley vs. Massachusetts, 155 U. S., 461, apply with accuracy to the actual point here involved.

> "Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such a manner as to induce the mass of the people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the states demand recognition of the right to practice a deception upon the people in the sale of any articles, *even those that may have become the subject of trade in different parts of the country?*"

III.

The contention of the defendants-in-error that because the importation of adulterated foods is a proper subject of regulation, and because Congress in Chapter 839 of the Laws of 1890, itself prohibited the importation into the United States of any "adulterated or unwholesome food * * * mixed in with any * * * noxious chemical," that therefore, that legislation was exclusive and that nothing else than that which fell within that definition could be the subject of an inspection law by a state, is, it is submitted, neither sound as a general proposition nor applicable, in fact, here.

It may be safely, for example, assumed that a yellow oxide of iron is a noxious chemical, at least sufficiently so to

prevent its being either a desirable adjunct to coffee or its having been intended to be affirmatively permitted by Congress as an adulterant for coffee. Neither, it will be observed, does the statute of the State of New York now under discussion nor does the Court of Appeals of New York in construing that statute attempt to change the definition given by Congress as to what constitutes adulteration.

The Act of Congress speaks of mixing in a noxious chemical with a food: that is, it refers to a physical combination of the chemical with the food product, and the coating and coloring of coffee with the oxide of iron in this case was a physical mixing of the two substances together until the food product became coated with the chemical.

As to the exact extent to which a particular chemical must be deleterious to health before it is to be considered as falling within the animadversion of the Act of Congress, the expressions of Mr. Justice FINCH in People vs. Girard, 145, N. Y. 105, become pertinent,

> "Any tampering with food products which adds ingredients not natural or essential is wrought with danger to the public health, or at least involves the intent and result of a fraud upon the community. Food should be pure, absolutely and unquestionably pure. No tricks should be played with it. The legislature may resolutely protect it.
>
> No artificial coloring can ever be added to distilled vinegar for any good and honest purpose that I can imagine. * * * Must the legislature wait for the experiment and until some number of people are made sick or die of it? In so serious a matter as the absolute purity of food, we ought not to say that a general law which compels that absolute purity is beyond the power of the legislature?
>
> There is talk here of interference with the

vested rights of the individual. Sometimes it is pertinent and weighty, but in this case it is neither. It becomes the assertion of a vested right to color a food product so as to conceal or disguise its true and natural appearance; in plain words, a vested right to deceive the public."

The contention that the language of Chief Justice FULLER in Leisy vs Hardin, 135 U. S., 100, 125, which is quoted on the brief of the plaintiffs-in-error, is applicable here is, it is submitted, not justified. The language clearly recognizes a distinction between various kinds of "articles," and clearly intends that an "article" which Congress deems to be a subject of commerce shall not be excluded. But the entire scope of all the decisions is that even where Congress has by specific enactment undertaken to regulate or incidentally to approve dealings in a particular article (as for example, oleomargarine), the states can, nevertheless, under their reserved police power, inspect such article, and if the inspection law be clearly passed in good faith and not as a device to prevent or prohibit commerce in the article, can; if they find the "article" in an improper or fraudulent condition or deleterious to health and therefore to be no longer an article of commerce, prohibit dealings in it.

This is specifically recognized in the very quotation referred to, which says, that articles which Congress recognizes as subjects of interstate commerce cannot be declared by the Court not to be such or be controlled by state laws amounting to regulations,

"*while they retain that character.*"

It will be noted, moreover, that in 1894 the Inspection Law of the United States, Chapter 839 of the Laws of 1890, was, at least so far as this case

is concerned, a farce. No pretense of inspection was made by any government official; no proof of any inspection having taken place under that law is given. The evidence offered is found at page 97 of the printed record. By that it appears that the invoices were stamped in the Custom House:

> "Coffee free, August 16, 1894, J. McC. F. Approved, J. R. F., Dep., Walter H. Bunn, appraiser."

It is apparent, that the only subject with which the United States concerned itself was the collection of duty. The oxide of iron might have been strychnine so far as any effect of the United States Statute was concerned.

It is also to be borne in mind that for the first time, after three trials before a jury, three appeals to the Appellate Division of the Supreme Court, and one appeal to the Court of Appeals, the suggestion is now made by the plaintiffs-in-error that this was "a contract between citizens of the State of New York as sellers and citizens of another State (to wit: Maryland) as buyers."

This suggestion has no place in this case.

The contract was entered into in the State of New York; it was to be performed in the State of New York; the tender of the goods took place in the State of New York.

The idea or suggestion that the goods were to be shipped to Maryland is negatived by every fact in the case. The contract itself (printed record, page 14) specifies the steamer by which the goods were to be shipped, and it being within the common knowledge of both the parties that that was a New York steamer, the contract does not mention any port of arrival; but it does specify (page 15 printed record) that the bill is to date "when coffee is all in store;" and the provisions of the contract for

grading indicate by their references to graders of the New York Coffee Exchange that it is anticipated that New York is the port at which the coffees were to arrive, and after arrival be tendered.

The stipulation entered into between the parties in relation to certain facts (at page 12 of the printed record), moreover, specified that the cargo arrived at the port of New York on the steamship "Catania," consigned to the plaintiffs in error, and was in the ordinary course of discharging cargo placed in store at the port of New York, and immediately tendered as an entirety to the defendants by the plaintiffs.

The attempted introduction of the element, or suggestion of the idea, that the law of the State of New York was here operating upon goods in anywise in transit is wholly unjustified by any aspect of the case.

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